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Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In Re Applications of	)	MM Docket No. 93-156
	)	
TRINITY CHRISTIAN CENTER OF SANTA ANA, INC., d/b/a TRINITY BROADCASTING NETWORK	)	BRCT-911129KR
	)	
For Renewal of License of Television Station WHSG(TV) Monroe, Georgia	)	
	)	
GLENDALE BROADCASTING COMPANY	)	BPCT-920228KE
	)	
For Construction Permit Monroe, Georgia	)	

To: Hon. Joseph Chachkin
Administrative Law Judge

REPLY TO OPPOSITION TO
MOTION TO DISMISS APPLICATION

Trinity Christian Center of Santa Ana, Inc., d/b/a Trinity Broadcasting Network ("Trinity"), by its counsel, pursuant to Section 1.294(c)(3) of the Commission's Rules, submits the following reply to the "Opposition to Motion To Dismiss Application" filed July 9, 1993, by Glendale Broadcasting Company ("Glendale").

A. Introduction

1. Trinity urged in its motion that Glendale's application be dismissed as ungrantable because Glendale is financially unqualified and could not now amend to cure that fatal defect. As Trinity pointed out, George Gardner plainly did not take the

pre-certification steps necessary under Commission policy to ascertain whether his non-liquid assets were sufficient to cover Glendale's estimated costs. In particular, Gardner's own loan commitment letter and Glendale's failure to produce any evidence of appraisals -- or even to dispute the point -- made clear that Gardner did not appraise his non-liquid assets before he certified. Having thus certified without a proper basis,

(a) as to what is required for reasonable assurance at the time of certification, and (b) as to the propriety of dismissal without hearing.

B. **Dismissal Without Hearing Is Proper**

4. There is no question that the Commission will now dismiss an applicant -- even in the midst of a hearing -- as soon as undisputed facts establish that the applicant lacked the requisite reasonable assurance of financing at the time of certification.[1/] The practice of dismissal is consistent with the policy, adopted by the Commission in 1989, that an application will be returned as non-tenderable if the applicant does not certify in the affirmative that it has the necessary reasonable assurance.[2/] Where an applicant did certify in the affirmative, but undisputed facts establish that the applicant actually lacked reasonable assurance at the time, dismissal is appropriate because the application had an undisclosed tenderability defect.

1/ Capitol City Broadcasting Company, 7 FCC Rcd 2629, 70 RR 2d 1429 (1992); Sharron Annette Haley, 6 FCC Rcd 4630 (1991); Carol Sue Bowen, 6 FCC Rcd 10, 11-12, 68 RR 2d 1240, 1242-43 (Rev. Bd. 1991); Marc A. Albert, 6 FCC Rcd 13, 14, 68 RR 2d 1246, 1248-49 (Rev. Bd. 1991); Edwin A. Berstein, 4 FCC Rcd 8420, 67 RR 2d 314 (Rev. Bd. 1989). Since dismissal is recognized by the Commission as the appropriate remedy in these circumstances, motions to dismiss are obviously likewise appropriate and are not improper, as Glendale contends. Opposition, p. 2.

2/ In the Matter of Application for Construction Permit for Commercial Broadcast Station (FCC Form 301), 4 FCC Rcd 3853, 3859, 66 RR 2d 519, 529 (1989).

5. In light of this dismissal policy, Glendale is simply wrong in contending that dismissal here does not lie. Dismissal does lie if the undisputed facts establish that, contrary to Glendale's certification, Glendale did not have reasonable assurance when it filed. It is immaterial that Glendale "in no way concedes that it was ever financially unqualified." Opposition, p. 2. If the relevant facts are undisputed, no hearing is required simply because Glendale disputes the legal conclusion to be drawn from those facts. The legal dispute can be resolved by pleading. See, United States v. Storer Broadcasting Co., 351 U.S. 192, 205 (1956) ("We do not think Congress intended the Commission to waste time on applications that do not state a valid basis for a hearing").

Gardner was functionally both the applicant and the lender, this policy required that, before he certified, he take the "necessary steps" to "ascertain" whether his personal resources were sufficient.

8. Since Gardner was relying on non-liquid assets, and since the Commission does not permit reliance on such assets unless they have been appraised, one of the "necessary steps" was to obtain appraisals of the non-liquid assets. Only by doing that could Gardner "ascertain" that his assets were sufficient to meet his commitment. It is meaningless that his financial statement listed his assets at $11,997,327. Values assigned to non-liquid assets in a financial statement are simply not recognized by the Commission for reasonable assurance purposes unless supported by current appraisal. Hence, if Gardner obtained no appraisals, he lacked reasonable assurance because he could not possibly have known whether his assets were sufficient under Commission policy.[3/]

9. Glendale misses the point completely in arguing that the applicable Form 301 instructions do not include appraisals among the documentation an applicant must have in hand when it files. Opposition, pp. 6-7. The issue is not documentation of

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3/ Certification would have no meaning if applicants could avoid verifying the value of their non-liquid assets until called upon to do so in a hearing. "Certify first, ask questions later" stands the certification procedure on its head.

Gardner's efforts. The issue is whether he made the effort at all to "ascertain" the value of his non-liquid assets before he certified -- as Commission policy required him to do. Aspen FM, Inc., supra.[4/]

D. **Gardner Clearly Did Not Obtain Appraisals**

[redacted]

in the application, the declaration is submitted to support Glendale's financial certification -- and more particularly to meet the issue raised by Trinity. Toward that end, the declaration provides facts about Gardner's financial statement and assets. Significantly, however, it does not say the one thing Gardner had to say that would resolve the appraisal issue in Glendale's favor (if it were true), namely that he conducted appraisals before he certified. This is now the second time Glendale has assiduously avoided saying that.[5/] The studied omission of such crucial information from Gardner's declaration, as well as from his loan commitment letter, is prima facie evidence that no appraisals were done -- a fact Glendale has never denied.

12. Glendale contends that only at the hearing stage may the Commission draw an adverse inference from a party's failure to provide information that would materially aid its defense.[6/] Opposition, pp. 3-4. However, Glendale offers neither authority nor a cogent reason for such a restriction. That Trinity bears the burden in the pre-designation stage is irrelevant, because the "adverse inference" principle on its face applies to any

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5/ The first was in the Miami proceeding. See Glendale's "Opposition to Contingent Motion To Enlarge Issues Against Glendale Broadcasting Company," filed June 7, 1993, in MM Docket No. 93-75, p. 10.

6/ See, Washoe Shoshone Broadcasting, 3 FCC Rcd 3948, 3953, 64 RR 2d 1748, 1755 (Rev. Bd. 1988); Port Huron Family Radio, Inc., 4 FCC Rcd 2532, 2535, 66 RR 2d 545, 550 (Rev. Bd. 1989).

party presenting evidence, regardless of burden. In assessing whether a hearing is required on a point in issue, the Commission is empowered to draw inferences. Gencom, Inc. v. FCC, 832 F.2d 171, 180-81 (D.C. Cir. 1987); Citizens for Jazz on WRVR v. FCC, 775 F.2d 392, 394-96 (D.C. Cir. 1985). Thus, when a party chooses to present certain facts in its defense at the pre-designation stage (as Glendale has done here), there is no logical reason why the Commission should not draw the same common-sense inferences from such presentation that it would draw in a hearing.

E. Glendale Has Not Demonstrated That It Is Financially Qualified

13. Acknowledging that the market value of certain assets must be discounted under Commission policy, Glendale argues that even after appropriate discounts are applied to the $11,997,327 shown on Gardner's financial statement, his assets exceeded Glendale's projected costs. Opposition, p. 8. However, that argument leads nowhere, because the $11,997,327 figure attaches to non-liquid assets and thus will not be recognized without appraisals. A cognizable figure for financial qualifications purposes results only when the discount is applied to appraised market values. Moreover, even taking Gardner's declaration in the light most favorable to Glendale, the ratio of his total assets ($11,997,327) to his loan commitment ($5,040,882) is substantially less than the ratios deemed acceptable in other

cases. Central Florida Communications Group, Inc., supra, at para. 11, quoting Texas Communications Limited Partnership, 6 FCC Rcd at 5194, n. 7 (slightly more than 2:1 ratio not enough).[7/]

F. **Conclusion**

14. An applicant is subject to dismissal if undisputed facts show that it lacked reasonable assurance of financing when it certified. When the applicant relies on non-liquid assets, the value of those assets must be ascertained through appraisals before certification. Here, it is absolutely clear from George Gardner's loan commitment letter and his response to this issue that he conducted no appraisals. That factual inference is not only permissible under Commission policy, it is compelled by this record. Moreover, it is a fact not disputed by Glendale. Since Gardner did not take the steps necessary to gain reasonable assurance before he certified, Glendale has an ungrantable application. When undisputed facts show that an application is ungrantable, no hearing is required.

7/ It should be noted that an unspecified portion of Gardner's assets are described as being "amounts receivable" (Gardner Declaration, p. 1), which cannot be relied on in any event. Accounts receivable can be relied on only to the extent they offset accounts payable. Midwestern Broadcasting Co., Inc., 15 RR 2d 76, 78, 15 FCC 2d 720, 722 (1968). Gardner had no accounts (or amounts) payable, since he asserts that he had no liabilities. Therefore, his certification based on "amounts receivable" is patently defective.

15. Accordingly, Glendale's application should be summarily dismissed.

Respectfully submitted,

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July 15, 1993

CERTIFICATE OF SERVICE

I, Nathaniel F. Emmons of the law firm of Mullin, Rhyne, Emmons and Topel, P.C., hereby certify that on this 15th day of July, 1993, copies of the foregoing "Reply to Opposition to Motion To Dismiss Application" were sent by first class mail, postage prepaid, to the following:

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